

U.S. Department of Labor

Office of Administrative Law Judges
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Jeffrey Mark Mitchell)
Complainant)
)
V.)
)
Link Trucking, Inc.)
Respondent)

May 9, 2001

Case No. 2000 STA 0039

For Complainant:

David J. Holdsworth, Esq.
Sandy, Utah

For Respondent:

Cass C. Butler, Esq.
Callister, Nebeker, and McCullough
Salt Lake City, Utah

Before: Stuart A. Levin
Administrative Law Judge

Decision and Order

This proceeding arises pursuant to the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, *et. seq.* and the regulations promulgated and published at 29 CFR Part 1978.100 to implement the Act. Jeffrey Mark Mitchell, a truck driver formerly employed by Link Trucking Company of Salt Lake City, Utah, filed a complaint alleging that he was the target of retaliation and discriminatory personnel actions when he was harassed and fired by Link management for engaging in safety-related activities protected by the Act.

Respondent, Link Trucking, denies these allegations. It maintains it fired Mitchell for insubordination of a high order. Yet Mitchell rebuffs Link's contentions and scoffs at its excuse. Yes, he irreverently leveled an obscene gesture at Link's president, middle finger extended and posted insolently within mere inches of his nose, and shouted the obvious obscenity at "the top of his lungs."

Mitchell was, he insists, impelled to this outburst by the harassment and abuse he endured for engaging in protected activity. Thus, Complainant embraces the Secretary's leniency as articulated in Kenneway v. Matlack, Inc., 88 STA 20 (Sec. June 15, 1989), a precedent which he construes as condoning a little lewdness in the context of the raw realities of a hotly contested labor dispute. *See*, Tr. 566, 586. We shall see whether, *inter alia*, this is a Kenneway situation.¹

Background

The record shows that Jeffrey Mark Mitchell, the Complainant in this matter, was hired as a truck driver by Link in January of 1998. Prior to the incidents which precipitated the instant complaint, Mitchell enjoyed a clean work record and was regarded as a good worker. Although Mitchell's delivery route could change each day, he primarily drove from Link's yard in Salt Lake City, Utah, to customers in Idaho. He usually made the round trip in one day.

Respondent, Link Trucking, is a diversified transport company with two operating divisions, an LTL General Commodities Division and a Sea Container Division. Its headquarters are located at Salt Lake City, Utah, and it operates terminals at Vernal and Leighton, Utah. Link has over 100 employees, including two mechanics and two mechanic helpers, 50 tractors, and 20 short, single-axle trucks. The Commodities Division works between Salt Lake City and the Mona Basin. The Sea Container Division represents several shipping lines, serving as their depot, repairing containers, loading and unloading containers, and transporting containers to the railroad and throughout the inter-mountain region, including runs within Utah and surrounding areas of Idaho, Wyoming, Colorado, Nevada, and California. Luther William Palmer is the owner and Chief Executive Officer of Link Trucking. Luther Scott Palmer is the President of Link Trucking. Tr. 412. Steven Lindsay, currently the Terminal Manager at Pacific Rim Transport, Inc., was until about three weeks before the hearing, Vice President of Operations at Link Trucking. Tr. 245.

The record shows that about 1:40 in the morning on February 9, 2000, Mitchell showed up at work ready to roll. The dispatcher had earlier informed him

¹Findings of Fact 1-92 in this matter are set forth in Appendix I which is annexed hereto and incorporated herein by reference.

that the chassis he was assigned to take to Boise was defect free. Mitchell's pre-trip inspection, however, revealed otherwise. A lens, a marker light, a flat tire, a missing locking pin handle, and an expired inspection all needed attention. Since Link's repair shop was closed, Mitchell unhooked the trailer, attached a red tag to it, prepared a Driver Vehicle Inspection Report (DVIR) noting the defects, unsuccessfully attempted to contact Lindsay on the company radio, clocked "in," and went home. Mitchell did not try to reach Lindsay by telephone from Link's offices but waited instead until he returned home before calling Lindsay at about 3:00 A.M.

Mitchell woke Lindsay and proceeded to tell him he needed to send a Link mechanic to fix the chassis he was dispatched to haul to Boise. Lindsay advised Mitchell that he was unable to reach Link mechanics at that hour and instructed Mitchell to take the chassis for repairs to Sapp Brothers, a 24-hour truck service center located several blocks from Link's yard. Mitchell refused and suggested that Lindsay dispatch another driver to take the chassis for repairs. Angered at Mitchell's refusal, Lindsay ordered him to take the day off without pay. Thereafter, Mitchell alleges he was subjected to a myriad of adverse actions and harassment culminating, 2 ½ days later, in his discharge as a driver for Link.

Discussion

Section 49 U.S.C. §31105 of the Surface Transportation Assistance Act of 1982, as amended, provides, in part:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because
 - (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (B) the employee refuses to operate a vehicle because
 - (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. See, Fountain v. P&T Container Services, 1999 STAA 9 (ARB, Nov. 30, 1999).

Mitchell alleges that, as a consequence of his protected activity, Link management forced him to take a day off without pay; assigned him to an inferior tractor; gave him undesirable dispatches; subjected him to ridicule, verbal abuse, aggression, and rage; followed him and told uninvolved persons that he was a problem; issued an unsubstantiated warning letter; called him to check on his lunch break; talked about him to other Link employees resulting in an uncomfortable working environment; downplayed an event of harassment; and fired him. CX11. Link does not dispute that Mitchell engaged in protected activities, but it otherwise denies his charges.²

Protected Activities

A brief summary of Mitchell's protected activities provides a context for later analysis. Mitchell noted defects on trailer KSCC 004332 in his Driver Vehicle Inspection Report (DVIR) on February 9, 2000. He reported the defects to Steve Lindsay at 3:00 A.M. on February 9 and refused to take the trailer for repairs. Later on February 9, he communicated alleged safety concerns and acts of retaliation by Lindsay to Special Agent James E. Waugh, Federal Highway Administration, and Scott Palmer. The next day, February 10, he discussed his alleged safety concerns with William Palmer and Scott Palmer, and later reported defects on truck 98. On February 11, he noted defects on the chassis he was

² The parties were afforded an opportunity to submit briefs post-hearing. Tr. 629-632. The employer filed a post-hearing brief on January 22, 2001. Complainant filed his on April 26, 2001.

dispatched to pick up at Bailey's Trucking and reported the defects to Lindsay, and later reported an act of alleged harassment to Lindsay and Palmer. Each of these reports and communications constituted protected activity; and it would not, under applicable decisions of the Administrative Review Board, be particularly useful at this point to analyze whether Complainant Mitchell has established a *prima facie* case. See, Frechin v. Yellow Freight Systems, 96 STA 24 (ARB, Jan. 13, 1998); Andreae v. Dry Ice, Inc., 95 STA 24 (ARB, July 17, 1997); Etchason v. Carry Companies of Illinois, Inc. 92 STA 12 (Sec., March 20, 1995). It should suffice simply to observe that Link management not only was fully aware of Mitchell's protected activity, but adverse personnel actions were taken against him in temporal proximity to his protected activity sufficiently close to give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA 24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997); Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. March 30, 1994); Crosier v. Portland General Electric Co. 91 ERA 2 (Sec. 1994); Samodov v. General Physics Corp., 89 ERA 20 (Sec. 1993). Accordingly, the critical inquiry is whether retaliatory animus motivated any of the adverse actions. Frechin v. Yellow Freight, *supra*.

Day Off Without Pay

Mitchell complains that Steve Lindsay, then Link's Vice President of Operations, penalized him with a day off without pay on February 9, 2000, for reporting safety defects in a trailer he was dispatched to haul to Boise, Idaho, and refusing to drive the trailer to a repair center several blocks from Link's yard. In reviewing the merits of his contention, Mitchell's conversation with Lindsay sets the context for Lindsay's actions which were to follow.

The record shows that Mitchell woke Lindsay at 3:00 A.M. on February 9 and told him that the chassis he was assigned to haul to Boise had a "bad tire" and "some other problems," but he did not specifically mention each problem he had written up in the DVIR. Since Link's shop was closed, Lindsay instructed Mitchell to take the chassis to Sapp Brothers for repairs. Mitchell reminded Lindsay that the load was already late for dispatch to Boise and suggested they wait until Link's repair shop opened at 6:00 A.M. to save money. In Mitchell's opinion, Lindsay's decision to have Sapp Brothers repair the trailer was not a "cost effective" way to handle the problem. In testimony recounting his conversation with Lindsay,

Mitchell, in fact, conceded that he refused Lindsay's instructions because he disagreed with the cost efficiencies of his repair decision.³ It may thus here be observed that a driver's refusal is entitled to whistleblower protection only if it rests upon cognizable public interests embodied in the Act not the driver's allegedly altruistic perception that his actions are consistent with his Employer's narrow pecuniary interests. A refusal predicated upon the latter consideration is not a protected activity.

Factors Not Disclosed to Lindsay

In assessing the actions of both Lindsay and Mitchell, it is important to note what Mitchell failed to communicate during the phone call to Lindsay. Mitchell acknowledges that their conversation was "very brief," and that he did not fully apprise Lindsay of all the defects he had written up. In addition, he failed to mention that he thought Sapp Brothers' repair facility was closed, although that rationale for his refusal was later offered at the hearing. Nor was Mitchell forthcoming in disclosing to Lindsay that he was calling from his home, not Link's yard. Not unreasonably, Lindsay believed Mitchell was at work, right there in the yard near the trailer when he called. Given Mitchell's focus on the cost of repairs, not safety, and Lindsay's understanding that Mitchell was standing by with the trailer, Lindsay reasonably could have expected Mitchell to defer to his assessment of the economics of the situation and take the trailer to Sapp Brothers.

Although there is evidence in the record indicating that Mitchell was peeved at the dispatcher for advising him the trailer was ready to go when it clearly was not, and other evidence, which Mitchell contests, suggesting that he may have decided to go home and not take the Boise run because the repair delays jeopardized a personal appointment he had later that afternoon, it is clear Lindsay had no idea Mitchell had gone home, and the anger he experienced at 3:00 A.M. when Mitchell insisted that he call in another driver to take the trailer for repairs while Mitchell remained on the clock seems amply justified.

³The parties prepared "Statements" of their recollections which, in some instances, embellish or conflict with their testimony adduced at the hearing. (See, CX 1: RX 11; RX 20). Although Complainant's post-hearing brief relies heavily upon these statements, my findings are based upon the testimony adduced under oath and subjected to cross-examination at the hearing, rather than the unsworn, self-serving statements which in Complainant's case was also unsigned.

Refusal Not Safety-Related

The record further shows that Lindsay did not react to any of Mitchell's alleged safety concerns, because Mitchell did not express any. He never hinted to Lindsay that he harbored any apprehension of injury or thought it unsafe to take the trailer to Sapp Brothers. He expressed no reservations to Lindsay that moving the chassis would constitute a federal violation, as he would later suggest in his "statement" (CX 1), and would subsequently argue at the hearing. Indeed, Mitchell himself suggested that Lindsay assign another driver to transport the chassis over to Sapp Brothers. Clearly, safety concerns did not motivate Mitchell's refusal to take the chassis for repairs, and protected activity was not an issue Mitchell's comments forced Lindsay to address.

Apprehension of Injury (Subsection (B)(ii))

While Mitchell and Link management agree the trailer was not safe to take long distance to Boise, Lindsay apprehended no danger when he ordered Mitchell to transport the trailer a few blocks to Sapp Brothers, but more importantly, Mitchell's refusal to take the trailer to Sapp Brothers was never based upon an apprehension of injury or risk expressed either to Lindsay during their telephone conversation or in testimony at the hearing. Accordingly, the "reasonable apprehension of injury" circumstances, or Subsection (B)(ii) protection would, therefore, seem inapplicable. Hadley v. Southeast Cooperative Services Co., 86 STA 24 (Sec. June 28, 1991); Duff Truck Line, Inc. v. Brock, No. 87- 3324 (6th Cir. 1988) (LEXIS, Genfed Library, Court of Appeals file), aff'g Robinson v. Duff Truck Line, Inc., Case No. 86-STA3, Sec. Final Dec. and Order, Mar. 6, 1987; LeBlanc v. Fogleman Truck Lines, Inc., Case No. 89-STA-8, (Sec. Dec. 20, 1989), aff'd, No. 90-4114 (5th Cir. Apr. 17, 1991); Gohman v. Polar Express, Inc., 88 STA 14 (Sec. Nov. 14, 1988).

Federal Violations Subsection (B)(i)

Mitchell's counsel did elicit testimony at the hearing indicating that Mitchell, at some point, came to believe that federal regulations published at 49 C.F.R. Section 396.11 (c) prohibited him from moving the chassis over the curb and taking it to Sapp Brothers as Lindsay had ordered. As the foregoing cases

indicate, apprehension of injury is not an element of the protections afforded by

Subsection (B)(i).

While it is doubtful that Section 396.11(c) is applicable since it requires a post-trip report and Mitchell was an outbound driver, Section 396.13 nevertheless requires that the outbound driver “must be satisfied that the motor vehicle is in safe operating condition....” It is not disputed that the refusal to move a truck when operating it would violate federal regulations is protected activity. Wilson v. Bolin Associates, Inc., 91 STA 4 (Sec. Dec. 30, 1991). As noted above, however, Mitchell’s refusal does not invoke this protection.

In Zurenda v. J&K Plumbing & Heating Co., Inc., 97 STA 16 (ARB June 12, 1998), the Administrative Review Board addressed the “federal violation” criteria. The trial judge in Zurenda found that Complainant had established that operating a truck would violate federal safety regulations, and therefore, Complainant engaged in protected activity under 31105(a)(1)(B)(i). The Board reasoned, however, that assuming the operation of the truck on November 25:

“‘...would violate federal safety regulations....’ that finding does not automatically mean that Zurenda engaged in protected activity. For, as the ALJ found, Zurenda did not refuse to drive the Mack truck on November 25 out of a concern for truck safety, but solely because he did not want to stay at the company apartment in Troy for three nights....”

Because his refusal to drive was solely related to non-safety concerns, the Board concluded “that Zurenda did not engage in protected activity when, on November 22, he refused to drive the Mack truck to Troy New York on November 25.” It would, therefore, appear that the existence of a federal violation does not *per se* protect a refusal to drive unless it is a factor in the driver’s decision. *See also, Monroe v. Climax Manufacturing Co.*, 1999 STA 20 (ALJ, May 31, 2000) (Refusal based upon desire to attend grievance proceeding not belatedly alleged safety concerns), *adopted* (ARB, March 8, 2001).

Of course, when a driver has dual motives, the “non-safety related reasons for refusing the assigned run... [do] not diminish the protection afforded to ...safety-related reasons for refusing the assignment.” Taylor v. Ryder Distribution Resources, 91 STA 14 (Sec. Feb. 11, 1992). Nevertheless, while Mitchell, at the hearing and later in his brief, proffered numerous additional reasons for refusing

Lindsay's instruction, his refusal, as communicated to Lindsay during their early morning phone conversation, was based upon Mitchell's assessment of the economics of the situation, and in this respect, Mitchell clearly intruded upon Lindsay's prerogatives as vice president of operations. Moreover, had Mitchell considered it either unsafe or a federal violation to move the trailer to Sapp Brothers, and had he advised Lindsay accordingly, the option existed to call Sapp Brothers for emergency mobile service to repair the chassis in Link's yard. Because safety issues involved in moving the trailer to Sapp Brothers never came up during their conversation, the option was not considered. Zurenda, therefore, seems applicable.

Now, I am mindful that the DVIR write-up itself constituted protected activity, and accordingly, in light of the temporal nexus with the adverse action, I have explored the notion that Lindsay may have acted on dual motives. While whistleblower cases demonstrate with considerable regularity that what motivates individuals subjected to diverse stimuli is not always easy to parse out, I would yet find, on this record, that the anger which prompted Lindsay to impose the sanction of a day off without pay was warranted and no pretext.⁴ Lindsay was credible when he testified about the factors which provoked his anger, Logan v. United Parcel Services, 96 STA 2 (ARB Dec. 19, 1996); and I have, in the foregoing discussion, carefully explored both direct and circumstantial evidence indicative of his

⁴ In Schulman v. Clean Harbors Environmental Services, Inc., 98 STA 24, (ARB Oct. 18, 1999), the presiding judge determined that the Employer had no improper motive in dismissing the Complainant, but, in the alternative, applied a "dual motive" test. The Board, however, considered the "dual motive" analysis "inappropriate" since the Schulman record did not "support a finding of any unlawful motive...." Yet, temporal proximity and dual motive cases involve closely related issues. Board decisions, for example, in "temporal proximity" situations give rise to an inferentially unlawful motivating factor, and the inference itself is grounded on circumstantial evidence, i.e. a time nexus. Consequently, where circumstantial evidence gives rise to this legal inference of improper motivation, evidence of other motivational factors must be considered and weighed before a finding may be entered that the adverse action was properly or improperly imposed. The Schulman Board, for example, determined that the "temporal nexus" inference of retaliation was insufficient to satisfy Schulman's burden of proof only "in light of evidence presented by [the Employer] regarding its motivation for [the] discharge," which it analyzed as legitimate.

Whether described as such or not, however, temporal proximity cases often involve issues closely approximating a "dual motive-type" analysis. Indeed, a close temporal proximity with protected activity may imply a dual motive for the adverse action, and it is not readily apparent why it would be inappropriate to explore that possibility. As the Board in Logan v. United Parcel Service, 96 STA 2 (ARB Dec. 19, 1996), succinctly observed, there may be circumstances in which: "...the close proximity in time between ... protected activity and Complainant's discharge suggest that Complainant was terminated for dual or mixed motives: (1) his protected activity, and (2) his misbehavior." (Citation omitted). Id at 3.

motivations. Indeed, Mitchell does not contend that Lindsay ever questioned the DVIR write-up or suggested that it was inappropriate. The record as a whole confirms that Lindsay acted neither unreasonably nor improperly on the information Mitchell conveyed to him and likely would have imposed the same discipline in the same manner in the absence of protected activity. *See, Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec., Aug. 31, 1992).

Finally, William Palmer, Link's owner and chief executive officer, in a meeting with Mitchell the next day, February 10, authorized payment to Mitchell for the round trip to Boise which Mitchell did not take. I will address that meeting in more detail in a moment, but here observe that Palmer's largess was not an admission of impropriety on Lindsay's part. To the contrary, while the discipline Lindsay imposed was justified under the circumstances, any punishment Mitchell endured as a consequence of a day off without pay was, nevertheless, lifted by Bill Palmer the next day.

Dispatch to California

The record shows that Mitchell called Link dispatcher Mike Caimi at 8:00 A.M. on February 9, and Caimi advised him he needed to speak with Lindsay before he could receive another dispatch. About 10:15 A.M., Lindsay called Mitchell and informed him that he had a California dispatch. Mitchell had no prior California deliveries, and his truck had no sleeping compartment. Believing that all the trucks dispatched to California were "sleepers," Mitchell considered the assignment retaliation for his protected activity earlier that day. It is, of course, fairly well settled that improper retaliation against a whistleblower may take the form of an assignment to unattractive, unwanted duties. *See, Griffin v. Consolidation Freightways, Inc.*, 96 STA 8 (ARB Feb. 3, 1998). This, however, is not such a case.

Mitchell met with Lindsay 45 minutes later, asked Lindsay why he was sending him to California, and claims Lindsay refused to respond. Lindsay testified that he told Mitchell he needed to send several trucks to California that day. While this difference is not crucial, questions about fairly esoteric nuances have been questioned in this proceeding, so I will address this dispute. I find it likely that Lindsay did tell Mitchell that Link needed extra help on the California runs. The record shows that Lindsay had discussed with Scott Palmer the demand for additional drivers to make California deliveries, and they decided to call Mitchell.

Since Mitchell was resisting Lindsay's dispatch, and asking to speak with Scott Palmer, it seems plausible that Lindsay informed Mitchell that Scott

Palmer was already aware of the dispatch and agreed it was justified by business necessities. Mitchell, however, had no desire to go to California, and he rejected the assignment. Lindsay, in turn, informed Mitchell that if he refused the dispatch, it would be his second refusal that day, and he would consider it a voluntary resignation. Mitchell appealed to Scott Palmer.

Mitchell Meets with Scott Palmer

At the time Mitchell met with Palmer, Palmer was aware of Mitchell's protected activity and his 3:00 A.M. telephone conversation with Lindsay. Mitchell explained that he did not want a California run, but instead wanted Palmer to give him the day off as Lindsay, who he called a liar, had previously directed. Notwithstanding Mitchell's protected activity, Palmer agreed: "I said, 'Okay, if you don't want to run and if you want the day off, then okay.'" Tr. 423-424.

The Dispatch was Justified

The record shows that Link tries to accommodate its driver when their needs conflict with a dispatch assignment; but if another driver is not available, the driver is expected to take the load. In this instance, Link dispatch records otherwise document an increase in the number of California runs on February 9, 2000. During a five-day period from February 2 through February 8, 2000, Link sent three trucks to California, one on February 2, one February 3, and one on February 4. On February 9, it needed four trucks and drivers to cover the California loop, and four more the next day. Since Link operated only three sleeper trucks, it was, contrary to Mitchell's misunderstanding, required to assign "non-sleepers" to several California dispatches.

Moreover, in designating drivers for dispatch to California, Link management considered a driver's long-haul experience. While Mitchell's background included no California deliveries, he was experienced in long distance hauling as a result of his runs to Idaho, and he was driving truck 80, one of Link's newer vehicles which management considered preferable for long-distance trips. His selection was entirely rational and demonstrably appropriate.

Considering the shortage of drivers and Mitchell's refusal, Lindsay had to call upon Dispatcher Mike Caimi to take a California run while Lindsay filled in as dispatcher during Caimi's absence. It thus appears a regular driver was not

available. Under these circumstances, Link's need for additional non-sleeper trucks and additional drivers to handle its California business on February 9 was not a

pretext for selecting Mitchell and his truck for a California dispatch. To the contrary, Lindsay had given Mitchell the day off without pay as punishment and was compelled by the circumstances to rescind his own directive by giving Mitchell this dispatch. His reasons for assigning Mitchell a California dispatch were legitimate initially, and his insistence that Mitchell take the trip seems consistent with Link's dispatch policies. I conclude that Lindsay was not influenced by Mitchell's protected activity when he ordered this dispatch, and in any event would have assigned Mitchell a California delivery absent his protected activity. Beyond that, I find no animus toward Mitchell at all evident in Scott Palmer's decision granting his request that he not be required to make a California run. Both Lindsay and Palmer acted properly.

Assignment to an Inferior Truck and Undesirable Dispatches

At 5:30 P.M., February 9, Mitchell called the dispatcher for his assignment the next day, and was advised he was working local Salt Lake City runs in truck 98. Mitchell's truck 80 was assigned to Mike Caimi for a trip to California the next day.

Mitchell considered both the local dispatch and his assignment to truck 98 punishment for his protected activity. The record shows that local runs were paid on an hourly basis, and Mitchell likely would earn less working locally than he might expect to earn on out-of-town runs. In addition, he considered truck 98 inferior to truck 80, his usual ride. It had a worn pig-tail electrical connection and leaked oil. Pondering its defects, he assessed its utility; truck 98, in Mitchell's judgment, overall was a "piece of shit." Thus we naturally must deem it a "less desirable" vehicle within the meaning of applicable Board decisions. *See, Frechin v. Yellow Freight Systems, supra*; *Griffin v. Consolidated Freightways Corp. of Delaware*, 96 STA 8 (ARB Feb. 3, 1998). Putting Mitchell in a rig like that could, if retaliatory, constitute actionable misconduct. Such circumstances need be carefully probed. *Frechin v. Yellow Freight Systems, supra*; *Hollis v. Double DD Truck Lines, Inc.*, 84 STA 13 (Under Sec., March 18, 1985).

Assignment to Truck 98

To be sure, Mitchell testified that he did not think it necessary to send his truck to California. Other trucks in better condition than truck 80, he believes, could have been sent instead of his truck. Mitchell acknowledged at the hearing, however, that he was not aware of Link's delivery needs on February 10.

The record shows that the number of Link's trucks in the California delivery loop on February 10, 2000, doubled over the previous day. According to its dispatch records, eight trucks and drivers were covering its California deliveries on both February 10 and February 11. Consequently, in addition to the three sleepers, California runs on February 10 required five day-cab trucks, including truck 80. Moreover, both Lindsay and Palmer testified credibly that truck 80 was a logical choice for a California dispatch precisely because it was one of their newer vehicles and likely more reliable on long-distance runs than the older day-cab trucks in Link's fleet. It was, therefore, assigned to dispatcher Mike Caimi when Lindsay sent him on a California delivery in place of Mitchell.

Now Mitchell and Link management disagree about whether the truck reassignment was permanent or temporary. While temporal proximity to protected activity inferentially suggests otherwise, additional considerations indicate Link's incentives would induce it to encourage Mitchell to take good care of the equipment it entrusted to him, and truck 80 was clearly the vehicle to which he had become attached. Palmer testified that it was in his company's interest to allow drivers to keep the same truck because they tend to take better care of the equipment.

The record shows that the usual driver of truck 98, Danny B., was sent to California in truck 66 on February 10, leaving truck 98 available for less demanding use by Mitchell. Upon Danny B.'s return, it is likely his truck 98 would have been returned to him. Moreover, the assignment of truck 80 to Caimi was not permanent since he was a dispatcher on temporary assignment. Scott Palmer testified that Mitchell would have gotten truck 80 back after Caimi returned it from California; and for the reasons discussed above, I find his testimony more credible than contrary testimony in this record. Thus, while the record demonstrates legitimate, rational grounds both for sending truck 80 to California and putting Mitchell in truck 98 until it returned, it is otherwise devoid of credible evidence that the assignments of truck 80 to Caimi and truck 98 to Mitchell were either permanent, retaliatory in motivation, or improper in intent.

Assignment to Local Runs

Mitchell also complains about the assignment to local runs. The record shows that Danny B. was assigned local runs in truck 98, including the "rails" loop on February 4. When Danny B. was dispatched to California in truck 66, truck 98 was available; and Mitchell, who declined a California trip, took over Danny B.'s runs in truck 98. As the driver of truck 98, it appears Mitchell was given, on a non-discriminatory basis, the same type of assignments Danny B. received when he

drove truck 98, including a “rails” loop. Consequently, this temporary reassignment to local runs was justified by the circumstances and not predicated upon a retaliatory motivation or indicative of disparate treatment. Griffin v. Consolidated Freightways, supra.

Mitchell Meets with William Palmer

Arriving at work about 6:00 A.M. on February 10, to begin his local runs in truck 98, Mitchell first went to the office of William Palmer to complain that he had been given the previous day off without pay. At the time, William Palmer was not aware of any problems which had occurred on February 9, and he listened to Mitchell’s concerns. Mitchell discussed the safety problems with Palmer, although, as previously discussed, safety was not the reason he gave Lindsay for refusing to take the trailer to Sapp Brothers. Nor does it appear that Mitchell emphasized with Palmer the subject of cost effectiveness which had been central to his rejection of Lindsay’s instruction.

Mitchell was initially polite, if not candid, with Palmer, but became upset when Palmer explained that he should have gotten the trailer repaired as instructed by his dispatcher. Palmer indicated that trailers often come in by rail with expired inspections, that DOT was aware of the problem, and they may be moved before the owners are located and inspections authorized. In addition, Palmer indicated that Mitchell safely could have moved Chassis KSCC 004332 to Link’s shop or a few blocks to Sapp Brothers. Palmer mentioned that a driver’s failure to follow a dispatcher’s instructions, under such circumstances, usually resulted in a warning letter about following instructions, but he assured Mitchell that he would not be punished further.

Mitchell advised Palmer that he had spoken with Special Agent Waugh at the Federal Highway Administration and was told that if he were punished, Link would be investigated. The record does not show whether Mitchell presented his case to Special Agent Waugh as a safety matter or revealed that his dispute with Lindsay actually involved, not safety issues, but whether it was cost effective to allow Sapp Brothers to fix the trailer. Nor does the record show whether Mitchell disclosed to the Special Agent that, notwithstanding the alleged problems with the trailer, he wanted Lindsay to dispatch another driver to move the trailer to Sapp Brothers. Nevertheless, Mitchell’s communications with both Waugh and William Palmer constituted protected activity since they addressed safety matters even while avoiding the issues which actually motivated Lindsay to impose the punishment. Thus, I am mindful that William Palmer acknowledged he was upset with Mitchell for contacting a federal agency before talking to him. He testified,

however, he told Mitchell he was free to “contact whoever you want.” The meeting ended and Mitchell returned to work.

The Second Meeting

A little later on February 10, dispatcher Don Allen reported to Lindsay and William Palmer that, although he knew Mitchell had February 9 off, he had seen him punch out on the time clock the previous night. The record shows that after he received the local dispatch in truck 98, Mitchell returned to Link at about 10:20 P.M. on February 9 to turn in the keys to truck 80 and “punch out” on the time clock. It may be recalled that he had punched “in” some 20 hours earlier after writing up the chassis he was assigned to haul to Boise. As he was punching out, dispatcher Allen saw him and reported that when he asked Mitchell what he was doing, Mitchell walked away without responding. Based upon this information, William Palmer, on February 10, obtained the timecard which revealed the times Mitchell punched “in” and “out,” and recorded that he had worked 20 hours and 20 minutes on February 9. Sensing something amiss, Palmer instructed Lindsay to have Mitchell report to his office. At about 11:10 A.M. on the morning of February 10, Mitchell and William Palmer met again.

William Palmer had ordered Mitchell to report to his office to inquire about his work hours on February 9. During their meeting, Mitchell acknowledged that he worked a little over one hour, and Palmer agreed to pay him for one hour on February 9. Mitchell left his office only to return immediately to demand that he be paid for the whole day. Palmer protested but eventually agreed to pay Mitchell for an eight-hour day at his usual rate of \$10.50 per hour, because he “didn’t want anyone to think I’m cheating them out of anything....” Mitchell left again, but remained dissatisfied.

A few minutes later he barged back into Palmer’s office. Palmer testified: “...he came flying back into my office and-- and threw (a) pay claim” and demanded to be paid for the Boise run. The difference, of course, between Mitchell’s pay for eight hours at his hourly rate and compensation for mileage plus layover on the Boise run was about \$100.00. Mitchell wanted compensation for a mileage run he did not take rather than the hours he did not work.

By this time, Scott Palmer, William’s son, had entered the office. He saw Mitchell “throw” the mileage claim paper “in his father’s face,” and heard him demand that his father sign it. Mitchell contends he merely “dropped” the claim on

Bill Palmer's desk, but whether he merely dropped the paper or propelled it across the desk in a throwing action, Scott Palmer perceived in Mitchell's demeanor disrespect for his father and it angered him. Reflexively, he grabbed an inspection report from Mitchell's hand, ordered him back to work, and denied his claim for mileage. William, however, immediately interceded by acquiescing in Mitchell's demand and approving the mileage claim, thus defusing the situation.

Seemingly satisfied, Mitchell turned and left the office, but apparently found himself unable to resist the urge to gloat a bit at Lindsay's expense. As he walked by Lindsay's office, he "looked in" and "... said, 'Hey Steve, they're going to pay me for that trip.'" He did not recall further taunting Lindsay, but Lindsay recalled Mitchell "proudly declaring that he had been paid for his run.... and asked me how I liked that and what I was going to do about that.'" Having considered the demeanor of these two witnesses at the hearing, and having observed Mitchell at counsel table grinning, not in disagreement nodding negatively or rolling his eyes as observers often do in court, but in obvious enjoyment as Lindsay recalled Mitchell deriding him, I conclude that Lindsay's testimony provides a credible account of Mitchell's comments. *See, U.S. v. Schipani*, 293 F. Supp. 156, 163 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262(2d Cir. 1969).

Mitchell is Observed Driving Unsafely

After leaving Lindsay's office, Mitchell went back to work. He dropped off a bare chassis in Link's rear lot, hooked up a new load, and departed the yard for his next destination, Emory Worldwide. Mitchell was unaware that Gorden Roberts, Link's yard manager, observed him driving in what he considered a reckless manner, spinning tires and kicking up gravel, using excessive force in hooking up a trailer, and departing the yard at excessive speed. At the time, Roberts knew nothing about Mitchell's protected activity or prior run-in with Lindsay or the Palmers. Acting entirely on his own and based solely upon his personal observations, Roberts reported what he had seen to Lindsay, who reported it to Scott Palmer. Concerned that Mitchell might be feeling a bit vindictive and abusing the equipment, Palmer decided to follow Mitchell to Emory.

At Emory, Mitchell spotted Palmer and walked over to him. Palmer warned Mitchell about abusing the equipment, and Mitchell accused Palmer of harassing him. As Mitchell returned to Emory's receiving dock, Palmer went inside, approached Scott Sorenson, an Emory employee on the receiving dock, and asked Sorenson to contact him if Mitchell caused a problem. The record shows that

Mitchell conducted himself appropriately at Emory, and Palmer returned to Link. Mitchell completed the Emory delivery and proceeded to his next stop, Brumbeck Trucking.

Verbal Abuse and Alleged Harassment

I have carefully reviewed the confrontations between Mitchell and Link management at various times on February 10, and conclude that they do not reflect harassment for protected activity. Mitchell met with William Palmer on two occasions. They disagreed about Mitchell's entitlement to pay for the Boise run and whether he should have seen to the repairs of the chassis as instructed by his dispatcher, but I find no evidence of harassment or retaliation in William Palmer's decision to pay Mitchell for the Boise run. Indeed, Mitchell was less than forthcoming in disclosing to Palmer that his reasons for disobeying Lindsay were cost-related, not safety-related, and he may have similarly misled Special Agent Waugh; but William Palmer paid him for a mileage run, and it would be difficult to construe his acquiescence in Mitchell's demands as an adverse personnel action.

Nor did Scott Palmer or Steve Lindsay harass Mitchell for engaging in protected activity. Lindsay had legitimate reasons for all of his decisions regarding Mitchell on February 9, and Scott Palmer, aware of Mitchell's protected activity, nevertheless allowed Mitchell to skip the California dispatch at Mitchell's request. Link urgently needed drivers and trucks for California deliveries, but overlooking a confrontation during which Mitchell called Lindsay a liar, Scott Palmer acquiesced in Mitchell's demand that he honor Lindsay's decision to give him the day off. Again, Scott Palmer was aware of Mitchell's protected activity, but his decision to permit Mitchell to refuse the California dispatch, thus overruling his vice president at Mitchell's urging, would hardly seem retaliatory.

To be sure, tempers indeed frayed the next day when Scott Palmer observed what he considered Mitchell's impertinence toward his father. Until then, Scott Palmer had treated Mitchell evenhandedly, but Mitchell's action in "dropping" or shoving a mileage claim at William Palmer and demanding that he sign it was viewed by Scott as a provocative, impudent action which angered him. Scott acknowledged that even after that meeting ended, Mitchell's actions toward his father "bothered" him.

Under these circumstances, Scott Palmer's feelings toward Mitchell were already ruffled when Gordon Roberts told him that Mitchell was driving recklessly in the yard. Scott decided to follow Mitchell to his next stop to satisfy himself that

Mitchell was acting appropriately. When he returned to Link, Palmer directed Lindsay to prepare a warning letter citing Mitchell for reckless driving as reported by Gorden Roberts and fraud based upon the 20 hours and 20 minute workday claimed on his time card for February 9. Given the temporal circumstances, it may be inferred that protected activities were a factor in Scott Palmer's actions; however, other properly cognizable factors were also involved, and the record does not indicate that they were pretexts.

While Scott Palmer, according to this record, barely acknowledged Mitchell's confrontations with Lindsay on February 9, he reacted at a personal level when Mitchell confronted his father in what he considered a disrespectful manner in William Palmer's office on February 10. Later, Scott was still seething when Gorden Roberts informed him that Mitchell was driving in a reckless manner, and he was not disposed to overlook it. In speaking harshly to Mitchell, following him to a delivery stop, speaking with the customer's employee about him, and checking on his lunch break, the record shows that Scott Palmer was motivated not only by a festering annoyance at Mitchell's behavior toward William Palmer, but the observations of Gorden Roberts who knew nothing of the protected activity and reported the reckless driving. In the absence of Mitchell's protected activities, Scott Palmer likely would have done nothing differently.

The Warning Letter

As noted above, at Scott Palmer's direction, Lindsay drafted a warning letter citing Mitchell for reckless driving in Link's yard and timecard fraud. Mitchell dismisses the letter as retaliation and harassment for his protected activity. He denies that he drove in a reckless manner or fraudulently abused the timecard system. Each charge is reviewed separately below.

Timecard Abuse

As previously mentioned, before leaving for home in the early morning hours of February 9, Mitchell punched "in" on the time clock allegedly to show that he had reported to work. Although he was heading home, he testified he "wasn't done with work for the day." Twenty hours and twenty minutes later, he returned the keys to truck 80 and punched "out."

On February 10, Bill Palmer confirmed that Mitchell worked only about one hour on February 9. Mitchell testified that his timecard was pulled before he had a chance to correct it, and he was not attempting to get paid for the hours shown but

was only trying to establish when he was present at Link. He claims he intended to correct his timecard at the earliest opportunity, but the opportunity did not materialize. After meeting with Mitchell in William Palmer's office, Scott Palmer reached a different conclusion. He believed that Mitchell intended to be paid for a Boise run whether or not Bill Palmer authorized a mileage run and had used the time clock as a back-up method to secure the paycheck to which he deemed himself entitled. I have carefully reviewed Mitchell's explanations and find they lack credibility.

The record shows that Mitchell had ample opportunity on February 9, not only to alert his supervisors that his timecard needed to be corrected or amended, he had several opportunities to leave a note on his timecard itself as he had done on previous occasions. Thus, when Lindsay gave Mitchell the day off without pay during their telephone conversation at 3:00 A.M. on February 9, Mitchell did not then mention that the time clock still showed him on duty and working. Mitchell spoke with dispatcher Mike Caimi at 8:00 A.M., and never mentioned he was on the clock even when Caimi told him he could not give him a dispatch until Mitchell spoke with Lindsay. At about 10:15 A. M. that morning, Mitchell spoke by phone with Lindsay, and about 45 minutes later met with him at the office. During neither conversation did Mitchell mention to Lindsay that the time clock still showed him on duty and working because, according to Mitchell, it was "not the right time" to discuss it.

After meeting with Lindsay, Mitchell met with Scott Palmer and asked him to honor Lindsay's prior instruction that he take the day off and allow him to refuse the California dispatch. Mitchell never mentioned to Scott Palmer that the time clock showed him on duty even as he demanded that he permitted to serve out Lindsay's punishment rather than go to California. As he left Palmer's office to go home, Mitchell again failed to punch out or leave a note.

At 5:30 P.M. on February 9, Mitchell spoke by phone with Lindsay about his assignment the next day and never mentioned the need to correct the timecard during that discussion. At 10:20 P.M. on the night of February 9, Mitchell returned to Link with the keys to truck 80 and finally punched "out." Yet, he left no note explaining the twenty hours of work it indicated he performed that day, and when specifically asked by Dispatcher Don Allen what he was doing, Mitchell walked away without responding because, he contends, it would have been hard to explain and other drivers were in the vicinity.

The next day, Mitchell was no more forthcoming. He arrived early and met with William Palmer at about 6:00 A.M. to complain about being given the day off

without pay. He never mentioned that his timecard showed him working over twenty hours the previous day, and unless the timecard were corrected or amended, Mitchell could expect to be paid his usual hourly rate of \$10.50 for the hours it showed him on duty on February 9.

The record, therefore, demonstrates seven telephone calls, meetings, or discussions Mitchell had on February 9 with Link dispatchers or managers, including at least four with Steve Lindsay, and a meeting the next day with William Palmer. During each contact, Mitchell had an opportunity to alert his supervisors that his timecard would need correction or amendment, yet he failed to mention it. Under these circumstances, his excuse that the time was “not right” to raise the timecard issue is not persuasive.

Complainant also testified that he attempted to retrieve his card later in the morning on February 10, and have Lindsay amend or correct it, but by then Bill Palmer already had it. His card was taken, he claims, before he was able to implement his normal process of correction. The record, however, does not support his assertion. Timecard documents in evidence show that Lindsay often initialed information handwritten on the timecard, but he never changed a time stamped on Mitchell’s timecard by the time clock. What Mitchell suggests would be purely routine actually would have been rather unusual. In any event, Mitchell had ample opportunity on February 9 and 10 to seek a correction of his timecard before it became an issue. Yet, not until he was actually confronted with his timecard did he acknowledge that it failed accurately to reflect his workday on February 9.

Finally, pursuing a somewhat different tack in his post-hearing brief, Complainant argues that Lindsay, in any event, must have known he was on the clock, because he asked Lindsay during their 3:00 A.M. conversation to allow him to remain on the clock while another driver took the chassis for repairs. This contention has no merit. Lindsay thought Mitchell was calling from Link’s yard, not his home, during their 3:00 A.M. conversation, and Lindsay had no reason to believe Mitchell would remain on the clock after he told him to take the day off without pay. To the contrary, he reasonably could expect Mitchell to clock out and go home.

Under all of the foregoing circumstances, Scott Palmer was justified in believing that Mitchell was determined to be paid for the equivalent of a Boise run

whether it was specifically approved or not. Link, accordingly, had bone fide reasons for citing timecard abuse in its warning letter.

Reckless Driving

The warning letter also admonished Mitchell for driving recklessly in the company yard. Mitchell denies the charge and asserts that the warning letter is unsubstantiated. The record shows that the reckless driving admonition in the warning letter was based upon the personal observations of Gorden Roberts. Roberts appeared as a witness at the hearing.

Following his meeting with Scott and Bill Palmer on February 10, and his brief stop in Lindsay's office, Mitchell went back to work. He called Roberts on the radio and received instructions to take a bare chassis to the back lot for storage. Roberts was meeting Mitchell with a forklift when he saw him attempting to turn the trailer around in very tight quarters, spinning the wheels of his tractor and kicking up gravel. Mitchell denied he spun the tractor wheels and called William Lloyd, Operations Manager at Mobile Group Storage, as a witness to the incident.

Lloyd testified that he was in the back lot on the afternoon of February 10 or 11, and saw a truck, but he was searching for a container, and "wasn't really concerned about the surroundings." He noticed Roberts in the forklift, but Lloyd did not know who was driving the truck, did not notice any airborne dust or gravel, and did not know whether the truck was moving. He emphasized that his attention was directed at the forklift and truck for just a moment because he was looking for a container. In view of the limitations Lloyd placed upon his own observations, it would be difficult to conclude that his testimony confirmed or refuted either Roberts' observations or Mitchell's denial.

Roberts further testified that, after stacking the chassis in the back lot, he saw and heard Mitchell use excessive force in hooking up a trailer, and watched as Mitchell exited the yard at excessive speed. Mitchell claims he hit the locking pin as usual and denied he was traveling too fast when he left the yard. For the reasons discussed below, I find Roberts' account of these incidents more credible than Mitchell's.

Initially, I note again that Roberts had no knowledge of Mitchell's protected activity when he reported Mitchell's unsafe driving. Nor did anyone who was aware

of Mitchell's protected activity encourage Roberts to report Mitchell. Retaliation, harassment, intimidation, or discrimination targeting a whistleblower was, therefore, not a factor motivating Roberts to complain to Lindsay about Mitchell's driving. Roberts may have observed the residuals of lingering resentment or anger which temporarily clouded Mitchell's judgment behind the wheel following Mitchell's meeting with the Palmers; but whatever the cause, it does seem Mitchell was a bit more aggressive than usual in his driving, and Roberts witnessed the result. I conclude that Mitchell drove his truck in the manner Roberts described.

Now I am mindful that not every trucker reported as driving unsafely in Link's yard is given a warning letter for reckless driving, and Roberts did not suggest that Mitchell be written up. First offenders like Mitchell usually are given oral warnings. Written warnings remain in a driver's file for ninety days and if his record remains clean over that period, the warning letter is discarded. Since Mitchell received a written admonition, I have evaluated his warning in the context of his protected activity.

Based upon Roberts' observations, I conclude that Link had valid reasons for citing Mitchell for reckless driving; however, based upon the treatment of other workers, such a warning, standing alone, would have been oral rather than written since this was Mitchell's first offense of this nature. Yet, Scott Palmer was not addressing only the driving issue. He was also reacting to the timecard abuse. Instances reflected in this record in which oral warnings were issued for driving infractions do not address the situation where multiple improprieties may have occurred. Consequently, it would be difficult to conclude on this record that a written warning encompassing more than one offense was discriminatory.

Further, assuming protected activity, in part, motivated Scott Palmer, a "dual motive" analysis would demonstrate not only that he was perturbed by what he perceived as Mitchell's lack of respect for his father, he had legitimate concerns about the driving and timecard abuses which had come to his attention. The warning letter issued upon foundations which were not pretexts for the charges it cited. Palmer likely would have issued a written warning to Mitchell, under these circumstances, absent his protected activity.

Mitchell's Last Day at Link

Mitchell arrived at work about 8:00 A.M. on February 11, and was

dispatched on local runs, first to Union Pacific and later to Bailey's to pick up a bare chassis for return to Link's yard. Upon inspecting the chassis at Bailey's, Mitchell noted safety defects including an expired inspection. Although Bill Palmer the day before had explained to Mitchell his understanding that trailers may be moved with expired inspections, it is unnecessary to determine on this record whether he was correct. Mitchell did not defer to Bill Palmer's advice in writing up the trailer at Bailey's; and Lindsay, upon learning of the defects Mitchell had detected, simply directed him to leave the chassis at Bailey's and pick up another at Union Pacific.

As instructed, Mitchell brought a chassis back to Link and met with Lindsay about the warning letter he had received the day before, greeting the Vice President of Operations, "Hey, Bullshitter." This was no mere flourish of low buffoonery, but Lindsay let this zinger pass. Mitchell proceeded to contest the warning letter, requesting and receiving an opportunity to respond in writing. Mitchell also met with Scott Palmer who admonished him and called him an idiot for using the wrong form in his write-up of truck 98. These incidents did not escalate, however, and Mitchell returned to work.

A Harassing Inscription

About 2:10 P.M., Mitchell returned to Link with his truck, bob-tail, and went to the dispatcher for his next run. Assigned to take a bare chassis back to Union Pacific, he was in the process of hooking up a trailer when he noticed the words "Butt Boy" written in the patina of grime coating the rear window of the cab of his truck. Considering the inscription an act of harassment rather than the badinage of a freight terminal, Mitchell stopped what he was doing and drove the truck over to Scott Palmer's office. Mitchell went in and invited both Palmer and Lindsay to accompany him into the yard. Both followed him out.

In the yard, Mitchell pointed to "Butt Boy" scrawled on the window of his rig, declared that he was being harassed, and demanded that Palmer and Lindsay interview the workers then in the yard to find the culprit. Because Palmer did not deem it feasible or effective to close the yard to prevent workers from leaving on their assigned dispatches pending the investigation Mitchell contemplated, he promised Mitchell he would pursue an inquiry later, but would not close the yard.⁵

⁵ To the extent Mitchell's co-workers may have teased or harassed him, I find no indication in the record that Link management participated or condoned it in any way.

His refusal to commence an immediate investigation “bugged” Mitchell, and a heated argument ensued.

One of the drivers getting ready to depart the yard at that time was Mitchell’s father, Gary. He saw Lindsay and Palmer arguing with his son; and although he was unable to hear them, he testified the situation looked “explosive.” As Gary Mitchell walked over, he was approached first by Scott Palmer and then by Lindsay. Gary Mitchell recalled; “ I talked to Steve and I tell him he’s got to do something to– I says ‘fire him.’ I said, ‘you know, you’ve got to– you’ve got to end this.’” Lindsay then walked back to Jeff Mitchell and fired him, but was immediately overruled by Palmer. Palmer told Mitchell he was not fired and offered to “work things out.”

Termination

Now it was not Lindsay’s decision to fire him at Gary’s suggestion that irritated Mitchell, but Scott Palmer’s intervention reversing the termination which angered him. Mitchell testified he felt Palmer was “sadistic” and “torturing” him by not firing him. Infuriated, Mitchell moved close to Palmer. Fist clinched at about chin level, middle finger pointed upward just inches from Palmer’s face, Mitchell executed an obscene gesture while screaming the familiar profanity which accompanies the gesture “at the top of [his] lungs,” spraying spittle in the face of Link’s president. Lindsay was next. Confronting Link’s vice president, Mitchell again articulated his extreme displeasure, repeating his vulgarity in word and deed, then walked away in high dudgeon as Scott Palmer, reversing his prior decision to retain Mitchell, declared that he was fired.

In Palmer’s view, Mitchell left him no choice. He offered to work things out and Mitchell “blasted” him in Link’s yard, placing the integrity of the company at stake. Palmer testified that as president of the company, he could not allow an employee to address him in that manner. He fired Mitchell for insubordination.

Kenneway v. Matlack, Inc.

I have carefully evaluated Mitchell’s contention that his outburst was the inevitable culmination of two and a half days of harassment he endured as consequence of his protected activity. Yet, the discipline and work assignments Mitchell received were all justified by circumstances unrelated to protected activity.

His final insubordination was entirely unwarranted, and the Secretary's decision in Kenneway does not suggest otherwise.

In Kenneway, the Secretary considered it relevant that the foul language, which was "not well documented," was uttered during a telephone conversation outside the workplace during off hours and did not threaten shop discipline. The Secretary reasoned that: "Any outburst on Kenneway's part was private, spontaneous, and directly provoked by Emory's persistence and temper," (Footnote omitted), and concluded that, "any language on Kenneway's part was not insubordinate in that it was not offered in defiance to management authority...." The circumstances here are clearly distinguishable. Mitchell's foul utterances were well documented, spoken out loud in the open in Link's yard, exploded spontaneously upon the incongruous provocation that Link's president salvaged his job, and clearly assailed management authority. Crown Central Petroleum, 430 F.2d 731; Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986). His conduct thus departs from the shelter of Kenneway.

Nor is it the mere vulgarity and abusive language which provides justification for the discharge in this instance. The conduct which accompanied the language clearly crossed the line of leniency Complainant senses in the Kenneway decision. Prior to this incident, Mitchell's protected activity otherwise did not unduly sensitize Link's management to his occasional verbal swipes. During the two and one half days Mitchell claims he was harassed, we find him needling and taunting Lindsay and calling him a liar and worse. Yet, these incidents were not pursued.

The quarrel in the yard, however, involved a level of energetic vitriol previous confrontations never reached. To be sure, Mitchell was shouting at Palmer and Lindsay and they were shouting back. As the Secretary has observed, labor disputes are often heated. The nature and character of this argument changed, however, when Mitchell reacted to Palmer telling him he was not fired. Although mere profanity may be insufficient, on occasion, to justify the discharge

of a protected worker under Kenneway, thrusting an obscene gesture at a supervisor in the workplace and shouting coarse invectives at such close range and with such force that spittle sprays on his face would seemingly exceed the bounds of incivility Kenneway might otherwise overlook. *See also*, Thomas v. Hall Express, 2000 STA 43 (ARB, Nov. 15, 2000); Durham, *supra*. I conclude that Mitchell was fired for

the legitimate, nondiscriminatory reason that he was grossly insubordinate.⁶

Conclusion

I am mindful of Complainant's argument that the mere presence of protected activity in temporal proximity to adverse action establishes a *prima facie* case and necessitates a "dual motive" analysis, but accepting his general proposition does not alter the outcome in this case. Mitchell engaged in numerous protected activities during the two and a half day period relevant to this proceeding and was disciplined in various degrees and durations. In the foregoing discussion, I have closely scrutinized the situations he deemed retaliatory and have concluded that each instance of discipline rested on legitimate personnel considerations and each allegedly adverse assignment was properly predicated on Link's response to resource allocation needs dictated by customer demands. The Employer has, thus, demonstrated that the adverse personnel actions reflected in this record, even if construed as the outgrowth of a dual motive, would have, nevertheless, been imposed absent Mitchell's protected activities. Moreover, while violators frequently search for plausible ploys for harassing those they regard as meddlesome whistleblowers, the explanations underlying Link's personnel actions here at issue were no mere pretexts for otherwise prohibited retaliation.

Finally, the record establishes that the termination, itself, was a spontaneous reaction to vituperative provocation rather than a complex manifestation of multiple motivating factors. Yet, assuming one accepts the notion of those who would contend that a dual motive crept into Scott Palmer's decision making process even as he wiped the spittle from his face, the evidence, nevertheless, supports the conclusion that Palmer would have fired Mitchell absent any protected activity. Palmer v. Western Truck Manpower, 85-STA-6 (January 11, 1987); Logan v. United Parcel Services, *supra*; Olson v. Missoula Ready Mix, 95 STA 21 (Sec. 1996); Clifton v. United Parcel Services, 94 STA 16 (Sec. 1995). For all of the foregoing reasons, I conclude that Link Trucking did not harass, retaliate, or otherwise discriminate against Jeffrey Mitchell within the meaning of the Act. *See, Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984);

⁶ Mitchell's termination merely interrupted the acrimony momentarily, but we need probe it no further here. Those who may be interested may peruse Findings 90 through 92 in the Appendix, but relief is not otherwise warranted, and the post-discharge implications of McKennon v. Nashville Banner Publishing Co., 513 U.S. 352(1995), need not be addressed.

DeFord v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983). Accordingly;

ORDER

IT IS ORDERED that the complaint filed by Jeffrey Mark Mitchell be, and it hereby is, Dismissed.

Stuart A. Levin
Administrative Law Judge

APPENDIX I

Findings of Fact

1. Following an investigation in response to Jeffrey Mark Mitchell's complaint, the Regional Administrator, Occupational Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, determined on April

28, 2000, that Mitchell was fired for legitimate, nondiscrimination reasons. Accordingly, his complaint was dismissed. Mitchell then requested a formal hearing which convened at Salt Lake City, Utah, on December 5 and 6, 2000.

2. The record shows that Complainant Mitchell was born August 31, 1961, DX 9, attended college, Tr. 289, and was hired as a truck driver by Link in January of 1998. He worked there as a truck driver through February 11, 2000. Tr. 28-29. Prior to the incidents which precipitated the instant complaint, Mitchell was never disciplined, Tr. 29, was regarded as a good worker, Tr. 291, and was mistreated by Link management for reporting any problem with the equipment. Tr. 138-139. Although Mitchell's delivery route could change every day, he primarily drove from Link's yard in Salt Lake City, Utah, to customers in Idaho. Tr. 29. He usually made the round trip in one day. Tr. 30.

3. Respondent, Link Trucking, is a diversified transport company with two operating divisions, an LTL General Commodities Division and a Sea Container Division. Tr. 332. Its headquarters are located at Salt Lake City, Utah, and it operates terminals at Vernal and Leighton, Utah. Tr. 333. Link has over 100 employees, including two mechanics and two mechanic helpers, 50 tractors, and 20 short, single-axle trucks. Tr. 333, 340. The Commodities Division works between Salt Lake City and the Mona Basin. The Sea Container Division represents several shipping lines, serving as their depot, repairing containers, loading and unloading containers, and transporting containers to the railroad and throughout the inter-mountain region, including runs within Utah and surrounding areas of Idaho, Wyoming, Colorado, Nevada, and California. Tr. 332.

4. Luther William Palmer is the owner and Chief Executive Officer of Link Trucking. Tr. 330-31.

5. Luther Scott Palmer is the President of Link Trucking. Tr. 412.

6. Steven Lindsay is currently the Terminal Manager at Pacific Rim Transport, Inc. Until about three weeks before the hearing, Lindsay was Vice President of Operations at Link Trucking. Tr. 245.

7. On February 8, 2000, Mitchell took a load to Idaho and was back in Salt Lake City by 11:40 A.M., Tr. 30-31. He then picked up a load at Union Pacific

Railroad in Salt Lake City and returned it to Link's yard at 1:00 P.M. Tr. 31. At about 5:00 P.M. on February 8, the Link dispatcher assigned the next days runs. Tr. 31. Mitchell was assigned to a Boise, Idaho, run, and he understood that the delivery had to be in Boise by 7:30 A.M. on February 9. Tr. 32.

8. Mitchell received the delivery receipt and was told the chassis or trailer, Tr. 512-3, and container he was to deliver were due to arrive at Link from Sapp Brothers, a truck service center located three or four blocks from Link's yard. Tr. 33; Dx 4. Mitchell left work at about 6:00 P.M. on February 8, but the chassis had still not arrived at Link. Tr. 34. Later, Link dispatcher, Don Allen, called Mitchell and advised him the chassis he was assigned to haul to Boise was defect free and ready to go. Tr. 361-63.

February 9, 2000

9. Mitchell returned to work at 1:35 or 1:40 A.M. on February 9, 2000. Tr. 35, 142. He entered his truck and drove into Link's yard looking for the container on the delivery receipt he had gotten from the dispatcher. He found it, hooked it up, and inspected it. Tr. 35.

10. Noting several defects with the chassis, Mitchell pulled it over to Link's shop at the yard, unhooked it, put a red tag on it, filled out a Driver Vehicle Inspection Report, and put it on the dispatch board. Tr. 37. Mitchell also punched "in" on the time clock with his time card at 2:39 on the clock, "to show what time I was down there," Tr. 37-38, 39; DX 2. Ordinarily, Link drivers do not punch in when they are driving out of town. Link pays them mileage at 25 cents per mile. Otherwise, drivers are paid at an hourly rate for non-mileage compensated work. Tr. 38. Mitchell testified that he punched "in" because "I was leaving and I wanted it to be documented that I had been there." He further testified, however, that he did not punch "out," because "I wasn't done with the work of the day. I had the whole day to go— it was only ...20 after 2:00 o'clock in the morning...." Tr. 143.

11. The Driver Vehicle Inspection Report Mitchell prepared listed five defects on chassis KSCC 004332, including; "Lense gone, light out in rear(marker), flat tire, inspection expired, and locking pin handle missing." CX 2; Tr. 36-37. Mitchell time-stamped the Inspection Report. Tr. 40.

12. Link's shop mechanics are not on duty from 11:00 P.M. to 6:00 or 6:30

A.M. Tr. 39. Consequently, no mechanics were on duty when Mitchell took the chassis to the shop at about 2:00 A.M. Tr. 39. Mitchell then tried to reach Steve Lindsay by radio, but was unsuccessful. Tr. 39-40. He did not, however, try to reach Lindsay by telephone from Link's office, but decided instead to go home. Tr. 39-40, 144.

13. Once home, Mitchell phoned Lindsay at about 3:00 A. M. Tr. 41, 145, 246. After Lindsay awoke, Mitchell told him; "Can you send a mechanic down, I've got a bad tire on my chassis that I have to take to Boise." Tr. 41. Lindsay asked what kind of tire it was, and Mitchell informed him it was a normal chassis tire, "and I need to have it fixed before I can go." Tr. 41.

14. Lindsay advised Mitchell that he was unable to reach any of Link's mechanics at that hour, and he told Mitchell to take the load several blocks to Sapp Brothers. Tr. 247. He believed Sapp Brothers operated a 24-hour truck stop where repairs could be performed and Link had an account. Tr. 248; DX 4. Mitchell instead suggested to Lindsay that they wait until the Link mechanics arrive at 6:00 A.M., but Lindsay told him to take it to Sapp Brothers for repairs. Tr. 42, 152.

15. Lindsay testified that Mitchell told him he wanted another driver to take the chassis to Sapp Brothers and he would remain on the clock while it was repaired. Tr. 251. This perturbed Lindsay. Mitchell had not told Lindsay that he was calling from his home, Tr. 207, 255, and Lindsay believed Mitchell "was already there," at Link's yard. It angered him that Mitchell not only wanted to remain on the clock, but wanted Lindsay to locate another driver at 3:00 A.M. to take the trailer to Sapp Brothers when Mitchell, who he thought was there with the truck, could drive it over. Tr. 251-52. Lindsay also testified that Mitchell told him it was too late for him to take the load to Boise because he had a dental appointment on the afternoon of February 9, and he could not be back in time. Tr. 253. In his post-hearing brief, Mitchell denied he mentioned a dental appointment during that conversation.

16. During this conversation, Mitchell mentioned that the chassis "had some other problems," but he did not specifically advise Lindsay of each defect he had written up. Tr. 209-210. Mitchell described the conversation as "very brief." Tr. 209.

17. Mitchell refused to take the chassis to Sapp Brothers for repairs: "I told

him (Lindsay) that it was late anyway, and it—there wouldn't be any incentive to pay extra to have some other mechanic to repair it, other than our own, being that it was late already is what I was – essentially what I was telling him in suggesting that we have our mechanics repair it. “ Tr. 42, 208.

Q. But he told you to take it over to Sapp Brothers. Why didn't you do that?

A. Just, I think what I said, that it – it wouldn't have gotten it there on time anyway, and it would just cost us more money to get it fixed over there, and I just suggested that we take it– or that we– that we wait. I said ‘Look, it's already late. Why don't we just wait until our mechanics come in, and then after its fixed I'll go with it.’ That's what I was saying to him.” Tr. 43.

18. Mitchell agreed that his concern about going over to Sapp Brothers, at the time he talked with Lindsay, “was the efficiencies of the costs that would be associated with having their mechanics do the job rather than Link's.” Tr. 210-211. In his post-hearing brief, he argued that he went home to get rest while the repairs were being made.

19. On cross examination at the hearing, Mitchell added an additional factor not mentioned to Lindsay for his refusal to take the truck to Sapp Brothers. He refused, not due to safety considerations or because he was already home, but because he “didn't think the shop was open at Sapp Brothers.” Tr. 154, 201; *But See*, DX 5. He did not, however, tell Lindsay that he believed Sapp Brothers was closed. Tr. 155-158, 211, 255, 293. After he was terminated, Mitchell called Sapp Brothers and testified that he was advised that Sapp Brothers did not perform Federal inspections on trailers. Tr. 156; *but see*, DX 4.

20. Asked by his counsel at the hearing on redirect whether he understood “it was proper to leave the Link area, the Link yard, with the chassis,” Tr. 201, Mitchell responded that after a write-up, “you're not supposed to drive them,” Tr. 202. That, however, was not the reason he gave Lindsay for refusing to take the chassis for repairs. The reason he did not follow Lindsay's instruction was allegedly his concern that having Link's mechanics perform the repairs “would be the most cost effective to handle the problem for Link.” Tr. 202.

21. On rebuttal, in response to questioning by his counsel, Mitchell added

still another alleged reason for not following Lindsay's directive to take the chassis to Sapp Brothers. DX 16 is the Fleet Safety Compliance Manual. Section 396.11(c), provides; "Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the inspection report." Tr. 473-74. Palmer testified that this allowed a driver to drive a vehicle to a repair shop on the premises or a reasonable distance to a repair shop. Mitchell testified on rebuttal that once he wrote-up the chassis, he could not be required to move it. Tr. 515-516. Mitchell, therefore, claimed he refused to "do what he (Lindsay) said," because according to the rules, Section 396.11(c), "it would be a violation...for me to take it over the curb." Tr. 516. Yet, Mitchell never mentioned any concern about violating any federal regulations when he spoke with Lindsay. Had he done so, other repair options could have been considered.

22. Scott Palmer previously confirmed, however, that Mitchell had the option to take the chassis to Sapp Brothers or have Sapp dispatch a mobile repair unit if Mitchell felt like he "couldn't get it to Sapp Brothers." Tr. 474. Mitchell did neither. He expressed no concern to Lindsay that moving the chassis to Sapp Brothers could be unsafe or risky. To the contrary, Mitchell, who was home when he spoke with Lindsay, specifically suggested that another driver be called to take the chassis to Sapp Brothers for repairs.

23. Lindsay, admittedly angry, told Mitchell to take the day off without pay. Tr. 43. Mitchell asked to come in at 6:00 A.M. and work locally that day, Tr. 254, 297, but Lindsay would not allow that. Tr. 254-55. He instructed Mitchell to call in later that afternoon for a dispatch for February 10. Tr. 255. Lindsay acknowledged that he raised his voice during the call in anger because Mitchell refused to take the load for repairs and make the Boise run. Tr. Tr. 254, 255; 476.

24. The chassis was later repaired, and another driver, Dave Rogers, eventually took the load to Boise. It arrived late but it does not appear Link suffered any consequences as a result of its late arrival. Tr. 475.

25. At approximately 8:00 A.M., Mitchell called the morning dispatcher, Mike Caimi. Tr. 43. Caimi advised Mitchell that he needed to talk to Lindsay before he could be given a dispatch. Tr. 44.

26. At about 10:15 A.M., Lindsay called Mitchell and told him that he was to report to work in three hours to take a load to California. Mitchell had not

previously taken a California run, Tr. 44, was unwilling to accept a California run, and he so advised Lindsay. Lindsay responded that if he didn't come in, Lindsay would consider him to have quit. Tr. 44. Lindsay confirmed that he advised Mitchell that the refusal of two dispatches in a short period would mean that he voluntarily quit. Tr. 260, 297.

27. The record shows that in practice, if a Link driver says he is unable to take a dispatch, Link tries to accommodate him. If another driver is not available, they expect the dispatched driver to take the load. Refusing one dispatch, however, is not deemed a voluntary quit. Tr. 480-81.

28. Prior to calling Mitchell, Lindsay and Scott Palmer had discussed the need for more drivers to take California loads that day and they had decided to call Mitchell in. Tr. 477.

29. Lindsay testified that Link usually had two or three sleeper trucks running loops to California, usually a three-day round trip. Tr. 418-419; 479. On February 9, 2000, however, it had four runs to California, Tr. 418-419, and Link dispatch records in evidence confirm the four California trips on February 9. The dispatch records also confirm that Link had eight trucks in the California loop on February 10, and eight again on February 11, 2000. DX 15; Tr. 420-21.

30. This increase in California business required Link management to "pull" non-sleeper trucks from local and other runs for California dispatch, using drivers who had more experience driving longer distances. Tr. 258. Since Mitchell had the experience driving to Idaho, and Link needed drivers for California runs, Lindsay gave him the dispatch when he called in at 10:15 in the morning on February 9. Tr. 258. Mitchell asked to come in to talk to Lindsay and Lindsay agreed. Tr. 45.

31. Mitchell arrived at Link at about 11:00 A.M. Tr. 45. He went to the shop looking for the inspection report he filled out the night before, Tr. 45, and couldn't find it. He asked the dispatcher for the write-up, and the dispatcher told him he had given it to Dave Rodgers, the driver who was assigned to take the load to Boise. Tr. 46. Mitchell then went to speak with Lindsay. Tr. 47; 260. Mitchell asked Lindsay why he was assigned to go to California, and according to Mitchell, Lindsay didn't want to discuss it. Tr. 47. Lindsay testified that he told Mitchell that he needed several trucks to go to California that day. Tr. Tr. 261, 256, 297.

32. At Mitchell's request, he and Lindsay then went to Scott Palmer, Lindsay's boss, and Mitchell complained that Lindsay had given him a day off without pay, then ordered him take a California run or he would consider him to have quit. Tr. 47; 423. Mitchell thought the California assignment was punishment, Tr. 48, because his truck was not a sleeper truck, and Link had sleepers for the California runs. Tr. 49. Lindsay asked Mitchell why he called in earlier to Mike Caimi if he wanted the day off and testified at that point Mitchell shouted at him that he "was a liar, and why didn't he stick to his word." Tr. 263. Palmer then asked Lindsay to leave the office, Tr. 263, and Palmer recalled Mitchell telling him he did not want to go to California, but rather wanted Palmer; "... to honor Steve Lindsay's decision to give me the day off." Tr. 423. Palmer acquiesced; "I said, 'Okay, if you don't want to run and if you want the day off, then okay.'" Tr. 423-424.

33. Lindsay had previously informed Scott Palmer about the 3:00 A.M. telephone conversation he had with Mitchell. Tr. 415-416. Notwithstanding Mitchell's protected activity, Scott Palmer allowed Mitchell to refuse to take the California run as Mitchell requested. Tr. 49-50; 264; Tr. 423-24.

34. On his way home from the meeting with Scott Palmer, Mitchell stopped by the offices of the Federal Motor Carrier Safety Administration to speak with someone about receiving a day off without pay. He met with James Waugh, Special Agent, Federal Highway Administration, and complained about the Boise dispatch. Tr. 50. After speaking with Waugh, Mitchell went home.

35. At about 5:30 P.M., Lindsay called Mitchell and advised him that he would be working local Salt Lake City routes the next day, February 10, 2000, Tr. 51, and would be assigned, not to truck 80, his usual ride, but truck 98, Tr. 52, which Mitchell described as "a piece of shit." Tr. 279; 439, 444-46. Mitchell considered this dispatch punishment because he considered truck 98 inferior to truck 80, and because he had been making out-of-town mileage runs which paid better than local runs. Tr. 52-53, Tr. 53; Tr. 439-440.

36. Mitchell alleged that the assignment of truck 80 to another driver on February 10, 2000, was retaliation for his protected activity; however, he acknowledged at the hearing that he was unaware of Link's delivery needs on that day. Tr. 164. The record shows that Link needed five day-cab trucks in addition to its three sleepers to cover the California loop on February 10. Tr. 425.

37. Mitchell believed there were other trucks in better shape than truck 80 that could have gone to California, and he did not, “think it was necessary to send mine.” Tr. 165. The record shows that Lindsay sent dispatcher Mike Caimi to California in truck 80. Tr. 279; Tr. 441-42. Lindsay testified the assignment was temporary and necessary due to volume of the California business. Tr. 279. The record further shows that the usual driver of truck 98, Danny B., was also sent to California in truck 66 on February 10. DX 15.

38. Lindsay testified that truck 80, rather than truck 98 was sent to California because it was a newer vehicle. Tr. 317. Palmer testified that truck 80 was a logical choice because it was one of his newer vehicles. Tr. 426. He further testified that it would have been returned to Mitchell after it returned from California. Tr. 426. He noted that, although trucks are occasionally reassigned to other drivers, *See, e.g.* Dx 17, and even Mitchell in the past had occasionally been assigned to drive other trucks, DX6; Tr. 159-164, Palmer considered it in the firm’s interest to have drivers use the same trucks because they tend to take better care of them, leave their personal items in them, and maintain them better. Tr. 440-441. Mitchell testified, however, that Scott Palmer later told him to “Kiss truck 80 good-bye.” Tr. 545.

39. As noted in Finding 10 above, Mitchell punched “in” before he went home at 3:00 A.M. on February 9. Over 20 hours later, Mitchell punched “out.” At about 10:20 P.M. on February 9, Mitchell returned the keys to truck 80, took his belongings out of the truck, and punched “out” on the time clock. Tr. 54-55; DX 2. He testified he punched out “...just to indicate to Steve that I had gone down there to return the key, to take my CB out....” Mitchell expected to be paid for these activities. Tr. 56.

40. Don Allen, the evening dispatcher, saw Mitchell punch out, approached him and asked him what he was doing. Mitchell reportedly just grinned at him and walked off without giving any explanation. Tr. 428; 482. Tr. 316. Mitchell explained that he failed to reply to Allen because it would have been hard to explain, and there were other drivers around, so he just walked out. Tr. 516-17.

February 10, 2000

41. On the morning of February 10, Mitchell showed up at work at 6:00 A.M., about a half hour early, and went to the office of William Palmer, Scott

Palmer's father, to complain about being given a day off without pay. Tr. 56-57; Tr. 342. At the time, William Palmer was unaware of any of the problems which had arisen the previous day. Tr. 342-343. Mitchell was polite as he complained that he thought he was being punished by Lindsay for refusing to take the Boise run. Tr. 361. Mitchell explained that the chassis had a flat or low tire and some lights out. Tr. 343.

42. Palmer testified that Mitchell was upset and that he tried to calm him down by assuring him that he would not be punished; but the dispatcher had instructed him to take the chassis to Sapp Brothers for repairs and Mitchell should have done what he was told. Tr. 344. Palmer testified that, under such circumstances, drivers usually got a letter about following instructions, but they were not punished. Tr. 344.

43. According to Mitchell, William Palmer told him he should have taken the Idaho trip notwithstanding the expired chassis inspection. He testified he was instructed he should take it to the port of entry in the neighboring state and get a ticket to complete the run. Tr. 57. William Palmer testified that in fifty-plus years of operating a trucking line, he never asked any driver to drive an unsafe vehicle. Tr. 336.

44. Upon reviewing all of the items Mitchell had written up on the morning of February 9, including a lens, a rear marker light, a flat tire, an expired inspection, and a missing locking pin handle, William Palmer testified that the chassis could safely be pulled to the shop at Link or a few blocks to Sapp Brothers. Tr. 359. Lindsay also testified that taking the chassis to Sapp Brothers was not unsafe over the distance required. Tr. 293.

With respect to the inspection, William Palmer explained that many chassis come by rail and the transporter may not know who owns them or who to contact to get an authorization to inspect them. DOT is aware of the chassis inspection problem, Tr. 347, 364, 384-85, and Palmer testified that Link has never been ticketed for pulling a chassis with an expired inspection. If, however, a driver ever were ticketed, Palmer testified that Link would pay it. Tr. 347, 364. Since the inspection report at issue involved a chassis, not a tractor, Scott Palmer testified that it becomes void once a new driver hooks onto it. The new driver is then responsible for writing it up. Tr. 435-36, 438, 481-82.

45. William Palmer testified that Mitchell should have gotten the chassis repaired and finished his run; and if he was going to be late making the delivery, he should have radioed in so that Link could call the customer and advise them when the delivery could be expected to arrive. Tr. 345.

46. Mitchell advised Palmer during this meeting that he had spoken with the Special Agent Waugh and told that Link would be investigated if it punished Mitchell for complying with federal law. Tr. 58-59; Tr. 353.

47. Palmer acknowledged that he was upset that Mitchell would contact the federal agency before talking to him about the problems the previous day, but he responded to Mitchell that he was free to “contact whoever you want.” Tr. 354, 367-68. Mitchell left Palmer’s office and went to work at 6:25A.M. Tr. 59.

48. Sometime later that morning, Don Allen told Lindsay that although he knew Mitchell had the previous day off, he saw Mitchell clock out the previous night, Tr. 268, and Lindsay informed Scott Palmer. Tr. 316; 427; 482. Allen also notified William Palmer, who asked Allen to bring the timecard to his office. Tr. 348, 380.

49. Although he had been given the day off without pay, the time card indicated Mitchell worked about 20 hours and 20 minutes on February 9. Tr. 501.

50. Mitchell’s hourly rate when he was on the clock was \$10.50. Tr. 501.

51. When Palmer heard about the discrepancies involving Mitchell’s time card, he instructed Lindsay to contact Mitchell on the radio and have him report to his office. Tr. 265, 349, 381.

52. At Lindsay’s instruction, Mitchell returned to Link with a bare chassis, saw Dave Rogers, the driver assigned the Boise run when Mitchell declined to make it, and obtained from him the inspection report Mitchell had prepared and dispatcher Caimi had given to Rogers. Tr. 60-64. Mitchell also claims he went to get his time card so Lindsay could “write him out,” and he wouldn’t be paid for the hours it showed on February 9, but he was unable to find it. Tr. 66-67. Mitchell testified that he intended to correct the time card indication, “At the earliest opportunity.” Tr. 169; 56.

53. Mitchell, citing CX 11, claims Lindsay wrote on his card virtually every

day. A review of the exhibit reflects, however, that Lindsay did not, as a regular practice, make adjustments or reconciliations to “time-stamped” times, only handwritten times that he authorized for Mitchell. Tr. 519-23 538-39. Lindsay did not monitor Mitchell’s timecard, but relied on Mitchell to bring timecard issues to his attention. Tr. 302; 548-49. The exhibit also shows that, unlike the situation on February 9, 2000, Mitchell had in the past left notes on his timecard. Tr. 539-40; CX 11.

54. Mitchell met with Bill Palmer at about 11:10 A.M., on February 10, 2000. Tr. 65-66. Mitchell took to Palmer’s office the inspection report he had prepared on chassis KSCC 004332 along with a mileage trip claim form for the Boise trip Mitchell had declined to take. Tr. 64-65. Palmer had Mitchell’s timecard. He asked Mitchell how much he actually worked on February 9th, Tr. 67, but did not ask Mitchell to explain the timecard itself. Tr. 381. Mitchell advised him he was in for a little over an hour in the morning. Tr. 67-68. Palmer agreed to pay Mitchell for one hour, and authorized an hour on the card. Tr. 350-351. Mitchell then left the office, but returned almost immediately and told Palmer he wanted to be paid for the whole day. Tr. 351.

55. William Palmer protested that Mitchell did not work a whole day, but Mitchell insisted, and Palmer eventually agreed. Tr. 351-52. He offered to pay Mitchell for 8 hours, at \$10.50 per hour or \$84.00. Tr. 68. Palmer explained his acquiescence: “I don’t want anyone to think I’m cheating them out of anything....So I said, ‘okay, I’ll pay you for the day’ and he left. “ Tr. 352. The matter was not resolved, however. William Palmer testified; “... a few minutes later, he came flying back into my office and—and threw (a) pay claim, I guess, threw a piece of paper.... and says, ‘ I want to be paid for a Boise run.’” Mitchell demanded that William Palmer sign his mileage claim form. Tr. 352-53, 371, 387.

56. The mileage claim with a layover for a Boise trip amounted to about \$184.50. Tr. 68-69. Mitchell says he merely “dropped” the mileage form on Palmer’s desk and asked him to sign it. Tr. 74; 525. William Palmer testified Mitchell threw it at him. Tr. 355, 371.

57. Scott Palmer had, by then, entered the office, heard what Mitchell was requesting, and saw what he described as Mitchell “throwing” the paper “in his father’s face.” Tr. 430; 483. Angry at what he regarded as Mitchell’s disrespect in throwing the paper at his father and demanding that he sign it, Tr. 430, Scott, after

some discussion, protested that there was “no way” Mitchell would be paid for a trip he did not take, Tr. 70; Tr. 353, 372; Tr. 431, grabbed the inspection report from Mitchell’s hand, and ordered him to get back to work. Tr. 71-73; Tr. 375; Tr. 434.

58. William Palmer interceded; “we are paying him for the run. We’re going to pay him for a Boise run. If he feels we cheated him out of the run, we will pay him for the run.” Tr. 353, 370, 372, 382; Tr. 484-86. Mitchell then turned and walked out of Palmer’s office. Tr. 355. William Palmer thought the pay matter was then resolved. Tr. 376. The incident continued to “bother” Scott Palmer. Tr. 486. The record shows that although he did not make the run on February 9, 2000, Mitchell was, as William Palmer agreed, paid by check dated February 11, 2000, for the Boise round trip of 678 mile plus a layover. DX 12.

59. As he was leaving Palmer’s office, Mitchell testified he walked past Lindsay’s door and “looked in there, and I said, “Hey, Steve, they’re going to pay me for that trip.” Tr. 73, 75. As Lindsay recalls Mitchell’s visit, Mitchell came downstairs to my office; “.... Jeff got right in my space, in my personal space, I guess you’d call it, within two or three inches of my face, and proudly declared that he had been paid for his run that he had not made to Boise, and asked how I liked that and what I was going to do about that.” Tr. 267. Lindsay responded that the Palmers were free to pay him if they wished, and he should go back to work. Tr. 267.

60. After visiting Lindsay, Mitchell returned to his truck and called Gorden Roberts on the radio to ask him where he wanted to store the chassis he was hauling. Roberts directed him to take the bare chassis to the back part of Link’s lot where he would meet Mitchell with a forklift to stack the chassis for storage. Tr. 75,77-78. Gorden Roberts, at the time of the hearing, was the Intermodal Operations Manager at Link Trucking. At times here relevant, he was yard manager. Tr. 389.

61. Roberts testified that as he drove over to meet Mitchell, he observed him trying to turn the chassis around in an aggressive manner, Tr. 408, spinning the tractor tires and throwing up gravel in an unsafe way given the tight position of the containers in the yard. Tr. 390-92, 401, 409-410. According to Mitchell, he just took the chassis to the yard, unhooked it where Roberts had directed, and found he was “kind of pinned in where he told me to go with it , and so I had to wait for him

to do what he was doing in order to get out of where I was.” Tr. 76-77; 526. Mitchell could not recall trying to turn the chassis around and described Robert’s testimony as “weird” in this regard. Tr. 526. After Roberts cleared the chassis with a forklift, Mitchell testified that he followed Roberts out of the back lot and drove to another lot to pick up his next load for delivery to Emory Worldwide. Tr. 77-78.

62. William Lloyd is Operations Manager at Mobile Storage Group in Salt Lake City. Tr. 219. Mobile Storage is located adjacent to Link’s Yard and stored containers in Link’s back lot. Tr. 220. Called as witness by Complainant, he testified that he was in the back lot on February 10 or 11, 2000, on a forklift trying to locate a container. He recalled seeing a truck, but he did not know who was driving it. Tr. 222. He did not notice if the truck was moving or how fast it was going if it was moving. After Roberts moved his forklift, Lloyd saw both Roberts and the truck move away. Tr. 221-22. He did not notice any dust or rock being “kicked up” because after a moment he was looking for a container and “wasn’t really concerned about the surroundings.” Tr. 223, 224.

63. Roberts testified that shortly after the incident in the back lot, he saw and heard Mitchell hook up a load “pretty hard” Tr. 392, 394, 401-02, and leave the yard “at a pretty good clip,” Tr. 392, which he estimated at 15 to 20 mph. Tr. 393, 402. The speed limit in Link’s yard is 5 mph. Mitchell denied he was

speeding and explained that he was merely hitting the pin in usual fashion to attach the chassis to the tractor. Tr. 527.

64. Roberts, on his own initiative, Tr. 316, told Lindsay about Mitchell’s driving in the yard. Tr. 271-72, 300, 404. At the time he spoke with Lindsay, Roberts was not aware of any problem involving Mitchell regarding a run to Boise. Tr. 395, 405. The record also shows that Roberts did not single out Mitchell but, from time to time, complained about others driving unsafely in the yard. Tr. 320.

65. Upon learning from Lindsay that Mitchell had been observed driving unsafely in the yard, and reflecting on Mitchell’s anger at the earlier meeting with his father, Scott Palmer “...felt it necessary to find out where he was going...and go...because I feared he might make a scene at a customer...” Tr. 448. Scott Palmer followed Mitchell to his next stop at Emory Worldwide. Tr. 78. Mitchell walked over to Palmer, and Palmer warned him about abusing the equipment. Tr.

79. Palmer recalled Mitchell accusing him of harassment. Tr. 449.

66. After Mitchell maneuvered the truck into Emory's loading dock, Palmer walked into the dock area, went to the dispatch window where he advised Emory personnel to watch out for Mitchell, and asked them to advise him if Mitchell got out of line. Tr. 80-81; Tr. 449.

67. Scott Sorenson works on the receiving docks at Emory Worldwide. Called as a witness by Complainant, he confirmed that Scott Palmer asked to be advised if Mitchell caused a problem. Tr. 226-27. He testified that he never had a problem with any of Link's drivers, including Mitchell who he described as polite. Tr. 228-29.

68. Palmer left Emory, returned to Link, and told Lindsay to write up Mitchell for timecard abuse and reckless driving. Tr. 450-51; 489. Scott Palmer reviewed the warning letter before Lindsay signed it. Tr. 451.

69. When Mitchell left Emory, he proceeded to his next stop, Brumback Trucking, where, at 1:50 P.M., he received a call from Lindsay telling him to return to Link immediately. Tr. 82. Since he was done for the day and had a dentist appointment, Mitchell returned to Link and prepared to leave work. Tr. 83; CX 5. He went into Lindsay's office where Lindsay and Scott Palmer were waiting for him with an employee warning letter they wanted Mitchell to sign. Tr. 84, CX 4; DX 7.

70. The Warning Letter, dated February 10, 2000, included a "Company Statement" which cited Mitchell for reckless driving in Link's yard as "observed by Gorden Roberts, the yard manager," and a fraudulent timecard. The letter advised that Mitchell was on probation for 90 days with the admonition that any further violations of company policy could result in termination. CX4; DX7. Mitchell obtained a copy of the warning letter, signed it, and punched out on the time clock. Mitchell testified that Palmer "was on my back" about abusing the equipment and admonished him all the way to his truck as he left for his dentist appointment. Tr. 85, 87. Palmer explained that he was not admonishing Mitchell, but he did follow Mitchell to his truck because Mitchell was so "visibly upset it was scary, I wanted to make sure he cleared the building...." Tr. 453; 490.

71. With respect to the charges in the warning letter, Lindsay testified he did

not ask Mitchell about the alleged timecard fraud because he could see when he punched “in” and “out.” Tr. 303. Scott Palmer testified that following the meeting in William Palmer’s office, he came to believe that Mitchell was bound and determined to get paid for the Boise run, and “I felt that he purposely punched those— those times in so that he would get paid for that day.” Tr. 432. When Scott asked Mitchell, during the meeting in William Palmer’s office, why he did not have his time card initialed, Mitchell responded that he had not had time to do it. Tr. 433. Scott concluded that Mitchell not only had ample time to discuss the matter with William Palmer at their 6:00A.M. meeting, and with Lindsay the day before, but he could have at least left a note. Tr. 433-34.

72. Although Mitchell testified that he intended to correct his timecard at the earliest opportunity, (*See*, Finding 52), the record shows he never mentioned the timecard error to Allen, Lindsay, Scott Palmer, or William Palmer, Tr. 428, prior to the time management confronted him about it. He never mentioned to Lindsay or Scott Palmer that he wanted to amend or correct the timecard until after he received the warning letter. Tr. 269; Tr. 426-27. At his meeting earlier in the morning with William Palmer, Mitchell never mentioned a need to correct his timecard, Tr. 348, and Lindsay had no reason to believe Mitchell had punched in on February 9. Tr. 315. The record shows that Mitchell met with Lindsay at about 10:15A.M. on February 9, and knew at the time he was on the clock. Tr. 550. He did not mention to Lindsay that his timecard needed to be corrected because; “I didn’t think the time was right....,” Tr. 550-51, and he did not punch out at that time or leave a note. Tr. 551-53.

73. With respect to the driving incidents, Roberts testified that in reporting Mitchell’s unsafe driving, he did not mention anything about writing Mitchell up. Tr. 396. William Palmer recalled that he may have told Lindsay “to write him up” for driving too fast in the yard, Tr. 373, 383, and Scott Palmer confirmed it was one of the items he mentioned should be included. When Mitchell told Roberts he had been written-up. Roberts responded: “I told him people get wrote up. When I was driving I was wrote up myself. It’s really no big deal to be wrote up. You just keep your nose clean, do your job, and it’s taken out of your file in 90 days.” Tr. 397-98.

74. Mitchell had never before been written up, Tr. 86; Tr. 291, and he was unaware of any other driver cited for reckless driving in Link’s yard. Tr. 212. Palmer testified that other drivers have been admonished for similar infractions in

the yard. Tr. 386-87. Some are written-up others are given oral reprimands. Tr. 399.

75. On his way home from the dentist after receiving the warning letter, Mitchell called dispatcher, Don Allen, on the company radio to ask about his assignments for the next day. Tr. 88. Allen told him he should report at 8:00 A.M. the next day February 11, 2000, to make local Union Pacific Railroad runs. Mitchell found both his start time and the Union Pacific runs unusual and a form of punishment because Link operations start at 6:00A.M., and he would be doing only local, hourly rate runs. Tr. 88-89.

February 11, 2000

76. On February 11, Mitchell showed up for work at 8:00 A.M. He was assigned truck 98 and dispatched to take a bare chassis to Union Pacific. Tr. 90. From Union Pacific, Mitchell was dispatched, bobtail, to Bailey's to pick up a load and return it to Link. Tr. 92. At Bailey's, Mitchell inspected the chassis and found safety defects, including tire problems and an expired inspection. Tr. 92; CX 6. He called and advised Lindsay, the acting dispatcher that day, that the chassis at Baileys had problems. Tr. 275. Lindsay directed Mitchell to leave the Bailey's chassis and go to Union Pacific for another bare chassis to return to Link. Tr. 93; 276; CX 6.

77. Upon his return to Link, Mitchell greeted Lindsay in his office; "Hey, Bullshitter," Tr. 277, 305. Mitchell was there to meet with Lindsay about the write-up he had received the day before, Tr. 95, and advised Lindsay that the "warning letter" was a "bull shit write up." Tr. 270. Mitchell wanted to write a response, and he advised Lindsay that he had a witness who said it was Gorden Roberts, the yard manager, who was spinning tires in the yard. Tr. 96; 271. The witness, William Lloyd, testified at the hearing. (*See*, Finding 62).

78. Mitchell also visited with Scott Palmer about a February 10 write-up he prepared on truck 98 which was written on the back of the Driver Trip Report. Tr. 98-100. Mitchell testified that Palmer was upset and called him an "idiot" because Mitchell noted an oil problem and a loose electrical receptor on truck 98 on the back of the Driver Trip Report. Tr. 100-104; 487. Palmer admonished Mitchell that such defects must, in accordance with Link's driver handbook, be noted on another short form which would then be turned in to the shop. Tr. 487-88.

Palmer explained that unless the short form was filled out by the driver, the shop would not be informed and the repairs might not be made. Tr. 487-89.

79. About 2:10P.M. on February 11, 2000, Mitchell returned to Link's yard for another dispatch. His truck was bob-tail when he went into the dispatcher. Assigned to take a bare chassis back to Union Pacific, he was in the process of hooking up the chassis when he noticed that someone had written "Butt Boy" in the dust on the back window of his truck. Tr. 107-108. Mitchell stopped what he was doing and drove the truck over to Scott Palmer's office, went in, and said to Palmer; "I have something to show you. Can you come out and look at it?" Tr. 108, 174; 282; 454; 490. Mitchell then got Steve Lindsay, and he and Palmer followed Mitchell outside . Tr. 109.

80. Once in the yard, Mitchell pointed to the truck, and said "Look at that. That's harassment," Tr.109, 111, 556. Other witnesses recall that Mitchell may have described the comment as "sexual harassment." Tr. 283; 455. Mitchell offered into evidence, CX 12, a copy of Link's "Sexual Harassment Policy Statement." CX 12; Tr. 529-31. Mitchell asked Palmer and Lindsay to find out who did it. Tr. 111; Tr. 455. He testified that he was concerned that the situation would escalate to physical violence, but he was just asking them to see if any of the men in the yard knew who wrote "Butt Boy" on the window. Tr. 113, 177.

81. Mitchell wanted Palmer to prevent anyone from leaving the yard until Palmer had interviewed them. Tr. 456; 491. Palmer or Lindsay told him not to worry about it, that the matter would be investigated, but their refusal to interview the men then in the yard "bugged" Mitchell. Tr. 175-176; 305, 309; 455, 491. Palmer promised an investigation, but indicated he doubted anyone would admit they did it. Tr. 310. According to Mitchell, Palmer and Lindsay started to scold him in loud voices, moving up close to Mitchell and complaining that what Mitchell had done to Bill Palmer, throwing paper in his face, Tr. 492, was harassment. Tr. 111-112; 283; 457; 491; 532. The volume of the discussion elevated into a "shouting match." Tr. 491; 457.

82. Gary Mitchell is Complainant's father, and also a driver for Link. Tr. 230. On the afternoon of February 11, 2000, he was leaving the yard in his truck when he noticed Palmer, Lindsay, and his son in the driveway "in confrontation." Tr. 231-32. Believing the situation was "explosive," but unable to hear what was being said, he jumped out of his truck to try and calm things down. Tr. 232. As he

approached, Palmer told him to leave, to “back off,” Tr. 458, but he could now hear “the language that was going back and forth.” Mitchell said to his father; “Do you see the way he’s yelling at me and approaching me aggressively like this? Do you see this?” Tr.113-114.

83. Palmer and Gary Mitchell moved off to talk for a few moments. Palmer returned and Lindsay walked over to speak with Gary Mitchell. Tr. 115. Gary Mitchell testified; “I talked to Steve Lindsay and I tell him he’s got to do something to—I says, “fire him.” I said, you know, you’ve got to— you’ve got end this.” Tr. 233-34, 240; 288-89.

84. When Lindsay finished speaking with Gary Mitchell, he returned and said to Jeff Mitchell, “You’re fired.” Tr. 116, 178-9, 234; 458. Jeff Mitchell then recalls Palmer “waving his arms” and “saying ‘whoa. Wait a minute, hang on Steve, be careful, let’s not do it yet.’” Tr. 117, 179-180. Scott Palmer recalled his comments a bit differently: “I said, ‘I overrule you Steve. We’re not firing Jeff.’ I turned to Jeff and I said, ‘You’re not fired. Let’s work this thing out.’” Tr. 458.

85. Mitchell testified that it was not Lindsay initially firing him which upset him, but Palmer’s decision not to terminate him that “really bothered” him. Tr. 116, 175, 183-4, 213; 531. He felt Palmer was “torturing” him and “being sadistic.” Tr. 116-17.

86. Mitchell testified he moved close to Palmer and, “I screamed, ‘Fuck you,’ right to his face,” Tr. 117, “at the top of my lungs,” Tr. 119. Palmer confirmed; “... he (Mitchell) did the middle finger to me in my face, close up, I felt spittle hit my face, and he told me to F’ you....” Tr. 458.

87. Mitchell then turned to Lindsay and moved close to him. Tr. 118, 182. Lindsay testified; Mitchell “flipped me off with his middle finger.... He held it right up against my nose, almost.... Then got in my face, within two or three inches and screamed ‘fuck you.’” Tr. 284.

88. While sequence of the confrontation may be recalled differently by these participants, Compare e.g. Tr. 506 with Tr. 117-18, 182, the substance of Mitchell’s comments are not disputed. Nor is the vehemence with which they were

uttered. After cursing both, Mitchell testified he then walked away from Lindsay and Palmer. Tr. 119; 533. Palmer caught up with Mitchell and advised him he was fired. Tr. 119; 285; 458.

89. Lindsay testified he was aware of occasions when employees directed profanity at Link managers. He was not aware, however, of any Link driver having been fired for using foul language, Tr. 318, but he regarded his instance different from other confrontations because Mitchell, “got in his face” and screamed at him. Tr. 319. Similarly, Palmer explained that he believed, in the circumstances, the integrity of the company would be lost if he allowed an employee to talk to the company president in that manner. In his view, Mitchell had pushed it too far. Tr. 460; 492-93. Palmer explained: “I said... ‘Let’s work things out.’ And he blasted me, and I--I thought I had no other choice.” Tr. 493.

90. Following his discharge, Mitchell took his possessions out of truck 98 and went into the office to get his last pay check. Tr. 122. Tempers were still heated, however, Tr. 285-86. While waiting in Lindsay’s office, Palmer left for a moment and Mitchell testified he and Lindsay were talking. Mitchell testified; “I used the word ‘ass hole,’” and Palmer rushed into the room, grabbed him by the left arm, and, according to Mitchell said, “That’s enough, Just get the hell out of here.” Palmer testified, “I overheard Jeff call Steve an ass hole, and I lost my cool....” Tr. 461.

91. Palmer tried physically to remove Mitchell from the office. Tr. 287; 461. Mitchell moved into an area where other employees were working, causing a ruckus, Tr. 124-125, 287, 462, and, at Palmer’s instruction, someone called the police. Tr. 287; 462. To calm matters down, Link’s accountant, Kent, then took Mitchell’s time card and prepared his final check as Mitchell hung on to an office partition. Tr. 462-63; Tr. 125-126.

92. The police arrived while Mitchell was waiting. The police report states that they responded to trespass call at Link, DX 9, and when they arrived, Mitchell wanted to press assault charges against Scott Palmer. Mitchell agreed with parts of the report, but testified that the report is “a lie” in several respects. *See*, Tr. 185-188. Palmer did not press charges and no one was arrested.